

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





*Signed*  
**74-2250**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

THE E. R. HITCHCOCK COMPANY, a corporation,  
Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

APPENDIX

SCOTT P. CRAMPTON,  
Assistant Attorney General,

GILBERT E. ANDREWS,  
WILLIAM A. FRIEDLANDER,  
RICHARD FARBER,  
Attorneys,  
Tax Division,  
Department of Justice,  
Washington, D.C. 20530.

Of Counsel:

PETER C. DORSEY,  
United States Attorney.

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PLACED ON TRIAL LIST 7/31/73

STATISTICAL RECORD	COSTS	DATE 1973	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed	Clerk	5/23	Edw. Scott	15.00
J.S. 6 mailed	Marshal	5/31	Deposit (GF 100869)	15.00
Basis of Action: Alleges that IRS wrongfully assessed and collected income tax ; seeks Judgement and damages	Docket fee			
Action arose at:	Witness fees			
	Depositions			

1973	PROCEEDINGS	Date Order Judgment
5/23	1. Complaint filed. Summons issued and together with same and 6 copies of complaint handed to Marshal for service.	
5/24	Appearance of Edw. B. Scott entered for Pltf.	
5/25	Marshal's return showing service upon U.S. Atty (3 copies) and receipt for certified mail to Atty General Wash. D.C. (2 copies)	
7/26	2. ANSWER filed. Appearance of Henry S. Cohn entered for defendant.	
7/31	NOTICE TO COUNSEL; mailed.	
11-26	3. PRETRIAL MEMORANDUM FOR THE DEFENDANT filed.	
11-26	4. Pretrial Order filed. Blumenfeld, J. m 11-23-73. Copies mailed to counsel of record.	
11-26	5. Statement of Damages filed by Pltf.	
"	6. Plaintiff's List of Witnesses & Exhibits filed.	
1-21	Pre-Trial in New Haven (Latimer) Pltf. motion for summary judgment to be filed by 1-14-74. & printed on calendar in March '74.	
12-6	7. Stipulation filed by both parties., with 2 exhibits.	
1-15-74	8. Motion for Summary Judgment, Statement of Material Facts, Supporting Motion for Summary Judgment, and Plaintiff's Memorandum of Law Supporting Motion for Summary Judgment filed.	
2-6	9. Defendants Cross Motion for Summary Judgment filed.	
"	10. Memorandum in support of Defendant's Cross Motion for Summary Judgment.	
3-11	HEARING on Pltf's Motion for Summary Judgment, Decision Reserved.	
5-28	11. RULING on Cross-Motions for Summary Judgment. Blumenfeld, J. m-5/27/74. Copies mailed to counsel of record.	
5-31	12. DEFENSE entered. Markowski, C. m 5/31/74. Copies mailed to counsel of record.	
6-6	13. Memorandum of Costs and Disbursements filed by Pltf.	
5-8	Court reporters notes of proceedings held on 3/11/74. Collard, R.	
7-26	14. Notice of Appeal filed. Civil Management Plan and Forms C & D handed to Atty Cohn. Certified copies of Notice mailed to counsel of record. and U.S.C.A. Certified copy of appeal and docket mailed to New Haven.	



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- 3 -  
UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT  
U.S. DISTRICT COURT  
NEW BRITAIN, CONN.

THE E. R. HITCHCOCK COMPANY, a  
Corporation  
Plaintiff

v.

UNITED STATES OF AMERICA  
Defendant

Civil Action No. H-54

Complaint

1. This action arises under the internal revenue laws of the United States, more particularly under 28 U.S.C. Sec. 1346(a) (1) and 26 U.S.C. Sec. 7422 as hereinafter appears.
2. On or before April 15, 1967 the plaintiff timely filed a Federal Income Tax Return for the calendar year, 1966, which showed taxable income of \$25,419.30 and there was paid therewith a Federal Income Tax of \$5,253.49.
3. On or about May 13, 1969 the Plaintiff executed and filed a Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment with respect to a deficiency of \$10,108.71.
4. On or about May 22, 1969, in accordance with said Waiver, a Federal Income Tax Deficiency was assessed against the Plaintiff in the amount of \$10,108.71 and on or about September 5, 1969 the Plaintiff received a bill for the amount of said deficiency plus interest of \$1,364.01, and on or about September 9, 1969, the Plaintiff paid said bill in full in the total sum of \$11,472.72.
5. The assessment of said deficiency of \$10,108.71, was based upon the determination that the Plaintiff's taxable income for the year 1966 included the sum of \$21,057.80 which was part of a Judgment recovered by the Plaintiff against the City of New Britain, in the Superior Court of the State of Connecticut in Hartford County, for the taking of its property by eminent domain, it having

been determined that said sum of \$21,057.80 represented that portion of the award which was intended to reimburse the Plaintiff for its moving expenses and which exceeded the amount actually expended by the Plaintiff in moving its machinery and equipment.

6. In written statements furnished to the District Director of Internal Revenue in connexion with the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment executed and filed by the Plaintiff, as aforesaid, the Plaintiff asserted that under applicable Connecticut law, moving expenses are an element to be considered in determining the fair market value of property taken, but are not a separate and distinct item of damages and in no sense a reimbursement for the actual cost of moving, and therefore, no portion of said award is ordinary income to the plaintiff.

7. Under date of December 13, 1969 the Plaintiff filed a claim for refund with the District Director of Internal Revenue for the District of Connecticut. Said claim demanded a refund of income tax for the calendar year 1966 in the sum of \$10,108.71 plus statutory interest. A true and correct copy of said claim for refund for 1966 is attached hereto and marked Exhibit "A", and made a part hereof.

8. On June 15, 1971, the Plaintiff received a statutory notice of the rejection of its said claim for refund.

9. The defendant, by such rejection, erroneously and improperly failed to determine that the entire amount received by the plaintiff as compensation for the taking of its property was capital gain and no part of the said award constituted ordinary income to the plaintiff. As a consequence, there has been erroneously and excessively collected from the plaintiff, federal income tax for and with respect to its calendar year 1966 in the amount of \$10,108.71, and interest thereon in the amount of \$1,364.01.

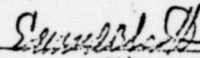


10. By virtue of the aforesaid, the defendant became and is indebted to the plaintiff in the amount of \$11,472.72 for wrongfully assessed and collected income tax and interest thereon, which amount has not heretofore been credited or refunded.

Wherefore the plaintiff demands judgment against the defendant in the amount of Eleven Thousand Four Hundred Seventy-Two and 72/100 Dollars (\$11,472.72), statutory interest thereon and the costs of this action,

CAMP, WILLIAMS and RICHARDSON

By



Edward B. Scott

Attorneys for the Plaintiff

130 West Main Street

New Britain, Connecticut 06050

CAMP, WILLIAMS  
& RICHARDSON  
ATTORNEYS AT LAW  
130 WEST MAIN STREET  
NEW BRITAIN, CONN.

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF CONNECTICUT

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CLERK  
U.S. DISTRICT COURT  
HARTFORD, CONN.

THE E. R. HINCHCOCK COMPANY,  
a Corporation,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. H-54

A N S W E R

Comes now, the defendant, the United States of America, by its attorney, Stewart H. Jones, United States Attorney for the District of Connecticut, answers the complaint as follows:

1. Admits that if jurisdiction exists, it exists by virtue of Title 28, United States Code, Section 1346(a)(1).
2. Admits the allegations contained in paragraph 2 of the complaint, except specifically avers that said return for 1966 was filed on March 7, 1967.
3. Admits the allegations contained in paragraph 3 of the complaint.
4. Admits the allegations contained in paragraph 4 of the complaint, except specifically avers that tax of \$10,108.71 was assessed on July 18, 1969, and paid on July 24, 1969, and that interest of \$1,364.01 was assessed on September 5, 1969, and paid on September 15, 1969.
5. Admits the allegations contained in paragraph 5 of the complaint.
6. Admits the allegations contained in paragraph 6 of the complaint, except denies each and every allegation contained in said written statement furnished to the District Director of Internal Revenue not otherwise admitted herein.



7. Admits the allegations contained in paragraph 7 of the complaint, except denies each and every allegation contained in said claim for refund not otherwise admitted herein. .

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Denies the allegations contained in paragraph 9 of the complaint.

10. Denies the allegations contained in paragraph 10 of the complaint.

WHEREFORE, defendant prays that the complaint be dismissed with prejudice and that judgment be entered in its favor together with costs.

STEWART H. JONES  
United States Attorney

HENRY S. COHN  
Assistant United States Attorney

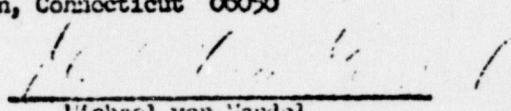
**OF COUNSEL:**

Michael von Mandel  
Trial Attorney  
Tax Division  
Department of Justice  
Washington, D. C. 20530  
Telephone: (202) 739-3583

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the foregoing Answer has this 23rd day of July, 1973, been made upon opposing counsel by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

Edward B. Scott, Esquire  
130 West Main Street  
New Britain, Connecticut 06050

  
\_\_\_\_\_  
Michael von Mandel  
Trial Attorney  
Tax Division  
Department of Justice  
Washington, D. C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF CONNECTICUT

THE E. R. HITCHCOCK  
COMPANY, a Corporation,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. H-54

[Filed December 6, 1973]

STIPULATION

Comes now the plaintiff, The E. R. Hitchcock Company, and the defendant, United States of America, by their respective attorneys and for purposes of this action only, stipulate and agree that the facts set forth herein are true and that the documents attached hereto are true and correct copies of the respective original documents:

1. This is a suit for the refund of federal corporate income taxes of \$10,103.71, assessed interest of \$1,364.01 plus statutory interest. Jurisdiction is conferred by Title 23, United States Code, Section 1346(a)(1). There is no dispute with respect to jurisdiction or venue.

2. On May 21, 1965, the land and building located at 39 Chestnut Street, New Britain, Connecticut, owned by the plaintiff and in which plaintiff conducted its business was taken by the New Britain Redevelopment Commission under its power of eminent domain. In June, 1965, the plaintiff was awarded \$69,000 by the Commission for the land and building. Plaintiff applied to the Superior Court for a review of the award. The award was reviewed by a referee of the Superior Court in a report dated July 29, 1966, a copy of which is attached hereto as Exhibit 1. The referee's report was reviewed by



Judge Pastore of the Superior Court of Connecticut for Hartford County at New Britain. A copy of the Superior Court's judgment of September 9, 1966, is attached hereto as Exhibit 2.

3. The plaintiff treated the entire condemnation awarded of \$130,000 as a nonseverable receipt in 1966 qualifying in its entirety for deferred recognition of gain under Section 1033 of the Internal Revenue Code of 1954. Plaintiff's actual moving expenses incurred in connection with the condemnation totaled \$18,940.20.

4. The District Director of Internal Revenue determined that the plaintiff received \$40,000 from the State for moving expenses and that this sum should be included in ordinary income to the extent that it exceeded actual moving expenses incurred. Thus, the plaintiff's income for 1966 was increased by the amount of \$21,059.80. Plaintiff paid the resulting deficiency and interest and filed a timely claim for refund, a copy of which is attached to the complaint as Exhibit A.

5. In the event that the Court should determine that plaintiff's income should not have been increased by the sum of \$21,059.80, judgment should be entered for the plaintiff in the amount of \$10,103.71 in tax and \$1,364.01 in interest, plus statutory interest.

CAMP, WILLIAMS & RICHARDSON

By: 15/

EDWARD B. SCOTT, ESQUIRE  
Attorneys for Plaintiff  
130 West Main Street  
New Britain, Connecticut 06050

STEWART H. JONES  
United States Attorney

By: 15/

Assistant United States Attorney

No. 144309

E. R. HITCHCOCK COMPANY	)	SUPERIOR COURT
	)	
V.	)	HARTFORD COUNTY
	)	
REDEVELOPMENT COMMISSION	)	July 29, 1966
OF THE CITY OF NEW BRITAIN	)	

REPORT OF STATE REFEREE

This matter was referred to me as State Referee to hear the evidence, view the premises and report to the Court.

1. Subject property is known as 39 Chestnut Street, New Britain, and consists of a lot having 5008 square feet, on which is a three-story and basement brick factory building, a description of which is contained in all the appraisal reports, which are made a part hereof. The plaintiff conducts a printing business in the premises.

2. On the basis of comparables, the land has a value of \$2.80 a square foot, or \$14,022.

3. On a reproduction cost, the building has a value of \$152,787. It is about forty years old and should be depreciated by 50 per cent, resulting in a depreciated value of \$76,393. By adding the land value, I arrive at a value for land and building of \$90,415.

4. If the income approach is used, I compute value as follows:

11,340 square feet at \$100	\$11,340
Less vacancy allowance	567
Gross effective rent	\$10,773
Less expenses:	
Taxes	\$ 1817.
Insurance	200.
Maintenance	300.
Net income to land and building	\$ 8,456
Less income attributable to land	
(\$14,022 at 6.5 per cent)	911
Net income attributable to building	\$ 7,545

*Exhibit 1*



5. This sum I capitalize at 10 per cent, resulting in a value of \$75,450. By adding land value, total value for land and building is \$89,472.

6. The plaintiff claims moving costs of \$48,729. Increased cost of moving is necessitated by overtime work in order to avoid interruption of plaintiff's business. I have examined all the moving items and am of the opinion that the plaintiff will need \$40,000 to move without interrupting its business. Obviously some inconvenience will be suffered from moving but I can make no allowance for such claim.

7. Taking moving costs into consideration, I am of the opinion that the fair market value of plaintiff's property on taking date was \$130,000.

8. I recommend payment to plaintiff of \$130,000.

---

Abraham S. Bordon  
STATE REFEREE

STATE OF CONNECTICUT

No. 144309

THE E. R. HITCHCOCK COMPANY - 12 -  
a corporation, of New Britain

SUPERIOR COURT

HARTFORD COUNTY  
At New Britain

vs

CITY OF NEW BRITAIN

September 9, 1966

Present Hon. PHILIP R. PASTORE, Judge.

This Application for Review of Statement of Compensation dated October <sup>14</sup> 13, 1965, wherein the plaintiff appeals from an assessment of damages made by the defendant, City of New Britain, acting by and through its Re-development Commission wherein said Commission having filed its Certificate of Taking dated May 24, 1965, thereby took property situated in the City of New Britain described as follows, to wit:

Commencing at a point in the south line of Chestnut Street 53.8 feet easterly from the northeasterly corner of land of the City of New Britain (Grammar School) and running thence easterly along the south line of Chestnut Street 45.45 feet to land now or formerly of Mainfield Realty Company, Inc. thence running southerly at right angles with the south line of Chestnut Street 121 feet to the northerly line of a 12 foot passway; thence running westerly along the northerly line of said passway to the southeasterly corner of land now or formerly of Letitzia Arena, which corner is 50.1 feet easterly from the southeasterly corner of land of the City of New Britain (Grammar School); thence running northerly 95 feet, more or less, to the place of beginning. The said premises being bounded NORTHERLY by Chestnut Street; EASTERLY by land now or formerly of Mainfield Realty Company, Inc; SOUTHERLY by said passway; and WESTERLY by land now or formerly of Letitzia Arena. Together with the right to pass and repass on foot and with vehicles over said passway from the above described premises to Elm Street only.

the defendant having assessed as damages to the plaintiff the sum of \$69,000. and having deposited said sum and bond all in accordance with the statutes in

CAMP, WILLIAMS  
& RICHARDSON  
ATTORNEYS AT LAW  
100 WEST MAIN STREET  
NEW BRITAIN, CONN.

Exhibit 2



such case made and provided, this application, praying review of said statement of compensation and seeking damages in excess of said sum, came to this court on November 2, 1965, notice of this appeal having been given to said Re-Development Commission by a proper officer leaving with said commission a true and attested copy of said application and of the Order of Notice issued by this court on October 14, 1965 as appears from the return of service thereon, and thence to December 10, 1965 when the defendant appeared and the parties being at issue, and the deposit having been paid to the persons entitled thereto, the court on February 18, 1966 appointed the Honorable Abraham S. Bordon, a state referee, to hear the evidence, reassess the damages and report make to this court, and thence to July 29, 1966, when the referee filed his report, and thence to the present time when the court on plaintiff's motion, ordered that reasonable appraisal fees in the amount of \$525.00 be awarded to the plaintiff and when the parties appeared and were heard by the court on the plaintiff's motion for the acceptance of the report and for the entry of judgment in accordance with the same.

The Court having heard the parties on said motion and report, accepts the report of said referee, finds that the amount due to the plaintiffs as damages for the taking of said land is \$130,000.00, that the sum of \$69,000.00 has been deposited by the defendant for the use of the persons entitled thereto and paid over to them and that the amount of the deficiency between the compensation finally awarded and the amount of money so deposited and paid is \$61,000.00, and that the sum of \$4,737.69 is due to the plaintiffs as interest.

Whereupon it is adjudged that the deficiency due to the plaintiffs for the taking of said land is \$65,737.69, together with costs taxed at \$635.50 which costs shall include said appraisal fees in the amount of \$525.00.

By the Court

*Joseph Xefe*  
Assistant Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE E. R. HITCHCOCK  
COMPANY, a Corporation

:

v.

:

CIVIL NO. H-54

UNITED STATES OF AMERICA

:

[Filed May 28, 1974]

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is an action to recover federal corporate income taxes for the year 1966 in the amount of \$10,108.71, assessed interest of \$1,364.01, plus statutory interest. Jurisdiction is conferred by 28 U.S.C. § 1346(a)(1). There is no dispute as to jurisdiction or venue. Upon a submitted stipulation of material facts, both parties have moved for summary judgment. Fed. R. Civ. P. 56.

I. FACTS

The stipulation of facts and attached exhibits indicate that on May 24, 1965, the land and building located at 39 Chestnut Street, New Britain, Connecticut, owned by the plaintiff and in which plaintiff conducted its business, was taken by the New Britain Redevelopment Commission under its power of eminent domain. In June 1965 the plaintiff was awarded \$69,000 by the Commission as just compensation for the taking of the land and building. The plaintiff then applied to the Connecticut Superior Court for a review of the condemnation



award. The award was reviewed by a referee of the Superior Court. In a report dated July 29, 1966, the referee found the value of the land and building to be approximately \$90,000.<sup>1/</sup> He also stated:

"The plaintiff claims moving costs of \$48,789. Increased cost of moving is necessitated by overtime work in order to avoid interruption of plaintiff's business. I have examined all the moving items and am of the opinion that the plaintiff will need \$40,000 to move without interrupting his business. Obviously some inconvenience will be suffered from moving but I can make no allowance for such claim."

The referee concluded, "I am of the opinion that the fair market value of plaintiff's property on taking date was \$130,000." The referee's report was reviewed and accepted by a judge of the Superior Court for Hartford County at New Britain. In a judgment dated September 9, 1966, the judge found "that the amount due to the plaintiffs as damages for the taking of said land is \$130,000.00 . . . ."

The plaintiff treated the entire condemnation award of \$130,000 as a nonseverable receipt in 1966, qualifying in its entirety for deferred recognition of gain under Section 1033

1/

The referee computed the value of the land and building in two ways with similar results. Adding the reproduction cost of the building, appropriately depreciated, to the value of the land, he arrived at a figure of \$90,415. Computing the value of the building by the income approach, appropriately capitalized, and adding the value of the land, he obtained a figure of \$89,472.

of the Internal Revenue Code of 1954, 26 U.S.C. § 1033(a)(3)(A).<sup>2/</sup>  
 Plaintiff's actual moving expenses incurred in connection  
 with the condemnation totaled \$18,940.20. The District  
 Director of Internal Revenue determined that the plaintiff  
 received \$40,000 from the state for moving expenses and that  
 such sum should be considered as ordinary income to the extent

2/  
 26 U.S.C. § 1033 provides, in pertinent part:

"§ 1033. Involuntary conversions

(a) General rule.--If property (as a result  
 of . . . condemnation . . .) is compulsorily  
 or involuntarily converted--

(3) Conversion into money where disposition  
 occurred after 1950.--Into money . . . , the  
 gain (if any) shall be recognized except to  
 the extent hereinafter provided in this para-  
 graph:

(A) Nonrecognition of gain.--If the  
 taxpayer . . . , for the purpose of re-  
 placing the property so converted, pur-  
 chases other property similar or related  
 in service or use to the property so con-  
 verted, . . . at the election of the tax-  
 payer the gain shall be recognized only to  
 the extent that the amount realized upon  
 such conversion (regardless of whether  
 such amount is received in one or more tax-  
 able years) exceeds the cost of such other  
 property or such stock."

Section 1033 "is a relief provision enacted to allow a tax-  
 payer to replace property involuntarily converted without  
 paying the capital gains tax incident to other exchanges of  
 property. . . . As a relief provision, this section is to be  
 construed liberally to achieve its purpose." John Richard  
Corp. v. Commissioner, 46 T.C. 41, 44 (1966).



that it exceeded actual moving expenses incurred. He therefore increased the plaintiff's income for 1966 by \$21,059.80. The plaintiff paid the resulting deficiency and interest and filed a timely claim for a refund. The parties agree that if the plaintiff's income for 1966 should not have been increased by \$21,059.80, judgment should be entered for the plaintiff in the amount of \$10,108.71 in tax and \$1,364.01 in interest, plus statutory interest.

## II. THE LEGAL ISSUE

The sole issue presented is whether the District Director of Internal Revenue was justified in increasing the plaintiff's income for 1966 by \$21,059.80. In considering this narrow issue, this Court looks to the law of Connecticut in assessing "the nature of the legal interest" which the taxpayer had in the amount awarded as just compensation by the Superior Court judge. Morgan v. Commissioner, 309 U.S. 78, 82 (1940). The plaintiff's land was condemned pursuant to those sections of the Connecticut General Statutes providing for the acquisition of real property by redevelopment agencies. See Conn. Gen. Stats. §§ 8-128 to 8-133. Connecticut follows the universal rule that just compensation for property taken by condemnation is the fair market value as of the date of taking. It has defined "fair market value" in a standard form: "A generally accepted definition of market value is 'the price that would in all probability--the probability

being based upon the evidence in the case--result from fair negotiations, where the seller is willing to sell and the buyer desires to buy.'" Portland Silk Co. v. Middletown, 125 Conn. 172, 174 (1939). See United States v. Miller, 317 U.S. 369, 374 (1943). In Andrews v. Cox, 127 Conn. 455, 457-458 (1941), the Connecticut Supreme Court stated the rule governing the factors to be considered in determining the compensation to be paid to owners of land which is condemned:

" . . . [I]n determining market values in awarding damages for land taken, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land; Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 408; Sargent v. Merrimac, 196 Mass. 171, 178, 81 N.E. 970; 2 Lewis, Eminent Domain (3d Ed.) p. 1232; Orgel, Valuation under Eminent Domain, p. 192; unless, indeed, the considerations advanced are not a necessary, natural or proximate result of the taking. Meriden v. Zwalniski, 88 Conn. 427, 434, 91 Atl. 439; see Orgel, *op. cit.*, p. 200. The determination of the damages to be paid requires the consideration of 'everything by which the value is legitimately affected'; Holley v. Torrington, 63 Conn. 426, 433, 28 Atl. 613; Platt v. Milford, 66 Conn. 320, 332, 34 Atl. 82; but 'considerations that may not reasonably be held to affect market value are excluded.' Olson v. United States, 292 U.S. 246, 256, 54 Sup. Ct. 704; 18 Am. Jur. 880."

In Harvey Textile Co. v. Hill, 135 Conn. 686 (1949), the plaintiff's land had been condemned by the defendant highway commissioner. The land and the factory building located upon it were appraised at \$42,500. The plaintiff



appealed to the Superior Court, the matter was referred to a state referee, and the referee valued the land and building at \$42,100. The referee also found that the cost of dis-assembling, moving and reassembling the machines in the factory would be \$5,000. He found that if the plaintiff were entitled to recover for the moving expenses, the damages would properly be \$47,100. If the plaintiff were not entitled to recover moving costs, the damages would be \$42,100. The trial court awarded damages of \$42,100 and the plaintiff appealed. The Connecticut Supreme Court held that the judgment was erroneous and that the damages should have included consideration of the costs of moving, not as a separate item, but as one element among "all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land." Andrews v. Cox, supra, 127 Conn. at 458. The court noted,

"Since the statute provides for the recovery of 'all damages' and since everything by which the value is legitimately affected is to be considered, the only remaining question is whether the necessity of removing the machinery legitimately affected the market value of the property."

135 Conn. at 689. The court then applied the rule to the specific issue of moving expenses:

"A simple illustration will bring out the application of these principles to the case at bar. An owner would demand a higher price for

a factory containing complicated and valuable machinery than he would for the same building idle and empty, because he would be faced with the necessity of moving his machinery to save it. His willingness to sell would be affected by this consideration, which would thus enter into the fixing of a fair market value. It was therefore the duty of the trier to consider this element in arriving at the fair market value, not as a separate specific sum of money to be added to the value of the land but as evidence tending to prove its fair market value."

Id. at 689-690. See Del Vecchio v. New Haven Redevelopment Agency, 147 Conn. 362 (1960); Slavitt v. Ives, 163 Conn. 198, 213 (1972).

The plaintiff argues from these cases that the District Director was not justified in considering the moving expenses referred to in the referee's report as an item separate from the value of the land and building and therefore taxable as ordinary income. The force of his contention is evident. The defendant does not cite any case purporting to hold that when, as a matter of law, moving expenses may not be considered as a separate item in computing a condemnation award but may be considered as an element of the fair market value of the land, such expenses may nevertheless be considered a separate item for the purposes of taxation. Rather, the cases upon which the defendant relies stand for the proposition that expenses which are separate from the fair market value of the land may be taxed as ordinary income. Thus, in Kieselbach v. Commissioner, 317 U.S. 399 (1943), the City of



New York had condemned property owned by the taxpayers and worth \$53,000. The City took title on January 3, 1933. The final decree in the proceedings was entered on March 31, 1937, and the taxpayers were paid \$73,246.57 on May 12, 1937. The difference between the latter sum and the \$58,000 value of the property was called "interest" by the Greater New York Charter: it was a sum which the owner of the property was entitled to receive, in addition to the value of the property fixed as of the time of the taking, to produce, when actually paid, the full equivalent of the value. The only issue before the Supreme Court was whether the "interest" amount was a capital gain, as the taxpayers contended, or ordinary income, as the Commissioner claimed. The Supreme Court held that the "interest" amount was not part of the just compensation for the land taken and therefore was taxable as ordinary income:

"The sum paid these taxpayers above the award of \$58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under § 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under § 117. The sale price was the \$58,000. [Footnote omitted.]

\* \* \* \* \*

... [P]etitioner contends that as just compensation requires the payment of these sums

for delay in settlement, they are a part of the damages awarded for the property. But these payments are indemnification for delay, not a part of the sale price."

317 U.S. at 403-404. See also Isaac G. Johnson & Co. v. United States, 149 F.2d 851 (2d Cir. 1945).<sup>3/</sup>

The defendant also seeks to draw support from Johnson v. Commissioner, 42 T.C. 880 (1964), and other cases involving "severance damages." This reliance is misplaced. This Court agrees with the holding in Conran v. United States, 322 F. Supp. 1055 (E.D. Mo. 1971), that gain arising from severance damages awarded for condemnation of property qualifies for deferred recognition when used to purchase replacement property. Moreover, regardless of the characterization of moving costs as a separate element of the award in the referee's report, as a matter of Connecticut law the cost of moving was not to be considered as a separate reimbursable item of damages but was only to be one of the considerations properly affecting the fair market value of the land condemned.

Harvey Textile Co. v. Hill, supra. Accordingly, the Court


<sup>3/</sup> Graphic Press, Inc., ¶ 60.71 P-H T.C. (Aug. 7, 1973), upon which the defendant also relies, is likewise distinguishable from the instant case. There the court held taxable as ordinary income an amount which constituted consideration for a waiver by the taxpayer of the state's obligation to buy machinery in a condemned factory at a price far in excess of what the state believed it could realize on it. The amount held to be taxable as ordinary income was clearly not part of the fair market value of the land condemned.



holds that the plaintiff's income for 1966 should not have been increased by \$21,059.80, and judgment should be entered for the plaintiff in the amount of \$10,108.71 in tax and \$1,364.01 in interest plus statutory interest.

SO ORDERED.

Dated at Hartford, Connecticut, this 28<sup>th</sup> day of May, 1974.

  
M. Joseph Blumenfeld  
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

- 24 -  
FILED

THE E. R. HITCHCOCK  
COMPANY, a Corporation

v.

UNITED STATES OF AMERICA

U.S. DISTRICT COURT  
NEW HAVEN, CONN.  
CIVIL NO. H-34

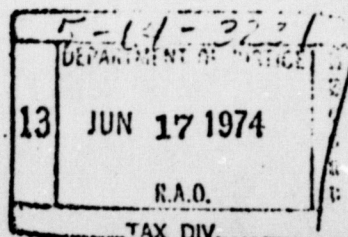
JUDGMENT.

This cause having come before the Court on Cross-Motions for Summary Judgment and the Court having filed its ruling on said Cross-Motions on May 23, 1974, with a finding in favor of the plaintiff that the plaintiff's income for 1966 should not have been increased by \$21,059.30 and that judgment should be entered for the plaintiff in the amount of \$10,108.71 in taxes and \$1,364.01 in interest plus statutory interest,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment enter for the plaintiff in the amount of \$10,108.71 taxes and \$1,364.01 in interest plus statutory interest.

Dated at New Haven, Connecticut this 30th day of May, 1974.

MARKOWSKI  
Clerk, United States District Court





CERTIFICATE OF SERVICE

It is hereby certified that service of this appendix has been made on opposing counsel by mailing four copies thereof on this 4<sup>th</sup> day of ~~October~~ <sup>November</sup>, 1974, in an envelope with postage prepaid, properly addressed to him as follows:

Edward B. Scott, Esquire  
Camp, William & Richardson  
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New Britain, Connecticut 06050

*Gilbert E. Andrews*  
\_\_\_\_\_  
GILBERT E. ANDREWS  
Attorney